Virgin Records America, Inc v. Thomas Doc. 277

IN THE UNITED STATES OF DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

CAPITOL RECORDS, INC., *et al.*,

Plaintiffs,

vs.

JAMMIE THOMAS,

Defendant.

Case No.: 06cv1497-MJD/RLE

PLAINTIFFS' PROPOSED JURY INSTRUCTIONS

Pursuant to the Third Amended Date Certain Trial Notice (Doc. No. 256, ¶ 2b(i)), Plaintiffs respectfully submit the attached set of Plaintiffs' proposed jury instructions upon which the parties have not stipulated.

Respectfully submitted this 1st day of June 2009.

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PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 1

We are about to take [our first] [a] recess and I remind you of the instruction I gave you earlier. During this recess or any other recess, you must not discuss this case with anyone, including your fellow jurors, members of your family, people involved in the trial, or anyone else. If anyone tries to talk to you about the case, please let the deputy clerk or other court personnel know about it immediately. Do not read, watch or listen to any news reports of the trial. Finally, keep an open mind until all the evidence has been received and you have heard the views of your fellow jurors.

I may not repeat these things to you before every recess, but keep them in mind throughout the trial.

8TH CIR. CIVIL JURY INSTR. § 2.01 (2008).

PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 2

The plaintiffs and the defendant have stipulated - that is, they have agreed - that if __________ were called as a witness [(he) (she)] would testify in the way counsel have just stated. You should accept that as being __________'s testimony, just as if it had been given here in court from the witness stand.

8TH CIR. CIVIL JURY INSTR. § 2.02 (2008).

PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 3

The plaintiffs and the defendant have stipulated -- that is, they have agreed -- that certain facts are as counsel have just stated. You should, therefore, treat those facts as having been proved.

8TH CIR. CIVIL JURY INSTR. § 2.03 (2008).

PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 4

I have decided to accept as proved the following fact[s]: __________________.

You must accept [(this) (these)] fact[s] as proved.

8TH CIR. CIVIL JURY INSTR. § 2.04 (2008).

PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 5

Certain charts and summaries have been shown to you in order to help explain the facts disclosed by the books, records, or other underlying evidence in the case. Those charts or summaries are used for convenience. They are not themselves evidence or proof of any facts. If they do not correctly reflect the facts shown by the evidence in the case, you should disregard these charts and summaries and determine the facts from the books, records or other underlying evidence.

8TH CIR. CIVIL JURY INSTR. § 2.10A (2008).

PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 6

You will remember that certain [schedules] [summaries] [charts] were admitted in evidence. You may use those [schedules] [summaries] [charts] as evidence, even though the underlying documents and records are not here. [However, the [accuracy] [authenticity] of those [schedules] [summaries] [charts] has been challenged. It is for you to decide how much weight, if any, you will give to them. In making that decision, you should consider all of the testimony you heard about the way in which they were prepared.]

8TH CIR. CIVIL JURY INSTR. § 2.10B (2008).

PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 7

Testimony will now be presented to you in the form of a deposition. A deposition is the recorded answers a witness made under oath to questions asked by lawyers before trial. The deposition testimony to be offered was recorded in writing and now will e read to you. You should consider the deposition testimony, and judge its credibility, as you would that of any witness who testifies here in person.

8TH CIR. CIVIL JURY INSTR. § 2.12 (2008).

PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 8

In these instructions you are told that your verdict depends on whether you find certain facts have been proved. The burden of proving a fact is upon the party whose claim depends upon that fact. The party who has the burden of proving a fact must prove it by the greater weight of the evidence. To prove something by the greater weight of the evidence is to prove that it is more likely true than not true. It is determined by considering all of the evidence and deciding which evidence is more believable. If, on any issue in the case, the evidence is equally balanced, you cannot find that issue has been proved.

The greater weight of the evidence is not necessarily determined by the greater number of witnesses or exhibits a party has presented.

You may have heard of the term "proof beyond a reasonable doubt." That is a stricter standard which applies in criminal cases. It does not apply in civil cases such as this. You should, therefore, put it out of your minds.

Capitol Records, Inc. v. Thomas, Jury Instruction No. 5, Oct. 4, 2007 (Doc. No. 97); 8TH CIR. CIVIL JURY INSTR. § 3.04 (2007).[1]

[1] The 2008 version of 8TH CIR. CIVIL JURY INSTR. § 3.04 contains revisions from the 2007 version, which was adopted by the Court on October 4, 2007.

PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 9

You should consider and decide this case as a dispute between persons of equal standing in the community, of equal worth, and holding the same or similar situations in life. A corporation is entitled to the same fair trial as a private individual. All persons, including corporations, and other organizations stand equal before the law, and are to be treated as equals

Capitol Records, Inc. v. Thomas, Jury Instruction No. 8, Oct. 4, 2007 (Doc. No. 97); 3 Kevin F. O'Malley, Jay E. Grenig, and Hon. William C. Lee, *Federal Jury Practice & Instructions* § 103.12 (2009).

PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 10

This is an action for copyright infringement. A "copyright" is the exclusive right to copy. A copyrighted work can be a literary work, musical work, dramatic work, pantomime, choreographic work, pictorial work, graphic work, sculptural work, motion picture, audiovisual work, sound recording, architectural work, mask works fixed in semiconductor chip products, or a computer program.

The owner of a copyright generally has the right to exclude any other person from reproducing, preparing derivative works, distributing, performing, displaying, or using the work covered by copyright for a specific period of time. One who reproduces or distributes a copyrighted work during the term of the copyright, infringes the copyright, unless licensed by the copyright owner.

In this case, each plaintiff contends that it is, and at all relevant times has been, the copyright owner or licensee of exclusive rights under United States copyright with respect to certain copyrighted sound recordings, and that the defendant, Jammie Thomas, without the permission or consent of such plaintiff, used an online media distribution system known as KaZaA to download the plaintiffs' copyrighted recordings and/or to distribute the copyrighted recordings to the public. Each plaintiff contends that Ms. Thomas' actions constitute infringement of its copyrights and exclusive rights under copyright.

Capitol Records, Inc. v. Thomas, Jury Instruction No. 9, Oct. 4, 2007 (Doc. No. 97); 3B Kevin F. O'Malley, Jay E. Grenig, and Hon. William C. Lee, *Federal Jury Practice & Instructions* § 160.01 (2009) (modified).

PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 11

I will now instruct you on the elements of the plaintiffs' claim for copyright infringement. In order to prevail on their copyright infringement claim, the plaintiffs must prove two things:

First: The plaintiffs are the owners of works protected by the Copyright Act.

Second: The defendant infringed one or more of the rights granted by the Act.

Each of these aspects has several elements that I will explain to you.

Capitol Records, Inc. v. Thomas, Jury Instruction No. 10, Oct. 4, 2007 (Doc. No. 97); 3B Kevin F. O'Malley, Jay E. Grenig, and Hon. William C. Lee, *Federal Jury Practice & Instructions* § 160.21 (2009) (modified).

PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 12

The first thing that each plaintiff must prove is that it is the owner of works protected by the Copyright Act. In order to prove this, such plaintiff must show either that it is the owner of the works in issue, or that such plaintiff is licensed by the owners of those works, permitting the plaintiff to claim ownership of those works or the exclusive rights to the works.

A plaintiff's certificates of registration of its copyright is what is called *prima facie* evidence of the element of ownership. In other words, if there is no evidence against a plaintiff as to that element, the registration certificate alone is sufficient to establish that element.

Capitol Records, Inc. v. Thomas, Jury Instruction No. 11, Oct. 4, 2007 (Doc. No. 97); 3B Kevin F. O'Malley, Jay E. Grenig, and Hon. William C. Lee, *Federal Jury Practice & Instructions* § 160.22 (2009) (modified).

PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 13

In addition to establishing that the plaintiffs are the copyright owners of the works in question, the plaintiffs must also prove that the defendant infringed the plaintiffs' rights in those works.

Capitol Records, Inc. v. Thomas, Jury Instruction No. 12, Oct. 4, 2007 (Doc. No. 97); 3B Kevin F. O'Malley, Jay E. Grenig, and Hon. William C. Lee, *Federal Jury Practice & Instructions* § 160.26 (2009) (modified).

PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 14

Each plaintiff claims in this case that the defendant violated its exclusive rights to reproduce and distribute its copyrighted works. One who either reproduces or distributes a copyrighted work during the term of the copyright, infringes the copyright, unless licensed by the copyright owner.

Capitol Records, Inc. v. Thomas, Jury Instruction No. 13, Oct. 4, 2007 (Doc. No. 97); 3B Kevin F. O'Malley, Jay E. Grenig, and Hon. William C. Lee, *Federal Jury Practice & Instructions* § 160.01 (2009) (modified).

PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 15

To prove infringement, the plaintiffs need not prove that the defendant intended to infringe. The defendant's intent is not relevant to prove infringement.

Pinkham v. Sara Lee Corp., 983 F.2d 824, 829 (8th Cir. 1992) ("The defendant's intent is simply not relevant [to show liability for copyright infringement]: The defendant is liable even for 'innocent' or 'accidental' infringements."); *Johns & Johns Printing Co. v. Paull-Pioneer Music Corp.*, 102 F.2d 282, 283 ("Nor is an intention to infringe the copyright essential under the Copyright Act."); *Ford Motor Co. v. B & H Supply, Inc.*, 646 F. Supp. 975, 989 (D. Minn. 1986) ("Intent is not an element of copyright infringement and, thus, absence of intent is not a valid defense to a claim of copyright infringement."); *Chavez v. Arte Publico Press*, 204 F.3d 601, 607 (5th Cir. 2000) ("Copyright infringement actions, like those for patent infringement, ordinarily require no showing of intent to infringe."); *Fitzgerald Publ'g Co., Inc. v. Baylor Publ'g Co.*, 807 F.2d 1110, 1113 (2d Cir. 1986); 4 NIMMER § 13.08, at 13-279 ("In actions for statutory copyright infringement, the innocent intent of the defendant will not constitute a defense to a finding of liability.").

PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 16

The act of downloading copyrighted sound recordings on a peer-to-peer network, without license from the copyright owners, violates the copyright owners' exclusive reproduction right.

Capitol Records, Inc. v. Thomas, Jury Instruction No. 14, Oct. 4, 2007 (Doc. No. 97); 17 U.S.C. § 106(1); *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 545 U.S. 913, 923, 929 (2005); *BMG Music v. Gonzalez*, 430 F.3d 888, 893 (7th Cir. 2005); *In Re: Aimster Copyright Litig.*, 334 F.3d 643, 645 (7th Cir. 2003); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2001); *UMG Recordings v. Mp3.com, Inc.*, 92 F. Supp. 2d 349, 350 (S.D.N.Y. 2000); 2 *Nimmer On Copyright* § 8.08[A][1], at 8-115.

PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 17

The act of distributing copyrighted sound recordings to other users on a peer-to-peer network, without license from the copyright owners, violates the copyright owners' exclusive distribution right.

17 U.S.C. § 106(3); *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 545 U.S. 913, 923, 929 (2005); *Perfect 10 v. Amazon.com, Inc.*, 487 F.3d 701 (9th Cir. 2007); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2001); *In re Aimster Copyright Litig.*, 334 F.3d 643, 647 (7th Cir. 2003); *Getaped.com, Inc. v. Cangemi*, 188 F. Supp. 2d 398, 401 (S.D.N.Y. 2002); *Atlantic Recording Corp. v. Anderson*, 2008 WL 2316551, at *7 (S.D. Tex. Mar. 12, 2008).

PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 18

A distribution of a copyrighted sound recording to MediaSentry on a peer-to-peer network violates the copyright owner's exclusive distribution right.

Capitol Records, Inc. v. Thomas, 579 F. Supp. 2d 1210, 1216 (D. Minn. 2008) (Doc. No. 197 at 11) (holding that "distribution to MediaSentry can form the basis of an infringement claim . . . Eighth Circuit precedent clearly approves of the use of investigators by copyright owners."); *see also Olan Mills, Inc. v. Linn Photo Co.*, 23 F.3d 1345, 1348 (8th Cir. 1994) ("the copies made by [the defendant] at the request of the investigator were copyright violations"); *Atlantic Recording Corp. v. Howell*, 554 F. Supp 2d 976, 985 (D. Ariz. 2008) (quoting *Olan Mills* and holding that "'[T]he investigator's assignment was part of [the recording companies'] attempt to stop [the defendant's] infringement,' and therefore the 12 copies obtained by MediaSentry are unauthorized.").

PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 19

An inference that a distribution actually took place may be made where a defendant has completed all the necessary steps for the distribution of copyrighted sound recordings to other users on a peer-to-peer network, without license from the copyright owners.

London-Sire Records, Inc. v. Doe 1, 542 F. Supp. 2d 153, 169 (D. Mass. 2008); *Atlantic Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 984 (D. Ariz. 2008).

PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 20

The act of making copyrighted sound recordings available for electronic distribution on a peer-to-peer network, without license from the copyright owners, violates the copyright owners' exclusive right of distribution, regardless of whether actual distribution has been shown.

17 U.S.C. § 106(3), regardless of whether an actual transfer of the file has been shown. *See New York Times Co. v. Tasini*, 533 U.S. 483, 506 (2001) (holding electronic publishers liable for reproducing and distributing the plaintiffs authors' copyrighted works by placing the works into an online database from where the works were "retrievable" by the public); *Perfect 10 v. Amazon.com, Inc.*, 487 F.3d 701, 718-19 (9th Cir. 2007) (confirming that a defendant who makes actual files available for distribution, not just links to files, "distributes" them under section 106(3)); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2001) ("Napster users who upload file names to the search index for others to copy violate plaintiffs' distribution rights."); *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 203 (4th Cir. 1997) ("When a public library adds a work to its collection, lists the work in its index or catalog system, and makes the work available to the borrowing or browsing public, it has completed all the steps necessary for distribution to the public . . . within the meaning of § 106(3)."); *Maverick Recording Co. v. Harper*, Civ. No. 5:07-cv-026-XR, slip op. at 3-6 (W.D. Tex. Sept. 16, 2008) (holding that 17 U.S.C. § 106(3) includes a "making available" right of distribution); *Atlantic Recording Corp. v. Anderson*, 2008 U.S. Dist. LEXIS 53654, at *19 (S.D. Tex. Mar. 12, 2008) ("[M]aking copyrighted works available for download via a peer-to-peer network contemplates 'further distribution,' and thus constitutes a violation of the copyright owner's exclusive 'distribution' right under 17 U.S.C. § 106(3)."); *Sony Pictures Home Entm't, Inc. v. Lott*, 471 F. Supp. 2d 716, 721-22 (N.D. Tex. 2007) (granting summary judgment to plaintiff motion picture companies based on evidence that copyrighted motion pictures were made available for download); *Advance Magazine Publishers, Inc. v. Leach*, 466 F. Supp. 628 (D. Md. 2006) (relying on *Tasini* and holding that a website operator violated the plaintiff's distribution right by "making available" from its online database copies of the plaintiff's articles); *Columbia Pictures Indus., Inc. v. T&F Enters., Inc.*, 68 F. Supp. 2d 833, 839 (E.D. Mich. 1999) (holding that the defendant violated the plaintiffs' distribution right by "[holding] video cassettes out for distribution to the general public without authorization"); *Playboy Enters., Inc. v. Russ Hardenburgh, Inc.*, 982 F. Supp. 503, 509 (N.D. Ohio. 1997) (finding distribution without actual transfer, and rejecting argument that defendants "never 'distributed' [plaintiffs'] photographs to their customers because it was the customers themselves who chose whether or not to download" the photographs from defendants' server); *Marobie-FL, Inc. v. Nat'l Ass'n of Fire Equip. Distribs. & Northwest Nexus, Inc.*, 983 F. Supp. 1167, 1173-74 (N.D. Ill. 1997) (finding infringement without transfers, and noting that "once the files were uploaded, they were available for downloading"); Letter of Marybeth Peters, Register of Copyrights, to Rep. Howard L. Berman, Sept. 25, 2002, *reprinted in* Piracy of Intellectual Property on Peer-to-Peer Networks, Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the House Comm. on the Judiciary, 107th Cong. 114-15 (2002) (citing the Supreme Court's *Tasini* decision and concluding that "making [a work] available for other users on a peer to peer network to download . . . constitutes an infringement of the exclusive distribution right, as well as of the reproduction right.").

PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 21

If you find that the plaintiff CAPITOL RECORDS INC. had a valid copyright and you find that the copyright was infringed by defendant, then you should find for plaintiff CAPITOL RECORDS INC. You must then decide on the amount of damages plaintiff CAPITOL RECORDS INC. is entitled to recover.

Capitol Records, Inc. v. Thomas, Jury Instruction No. 16, Oct. 4, 2007 (Doc. No. 97) (modified); 3B Kevin F. O'Malley, Jay E. Grenig, and Hon. William C. Lee, *Federal Jury Practice & Instructions* § 160.90 (2009).

PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 22

If you find that the plaintiff SONY BMG MUSIC ENTERTAINMENT had a valid copyright and you find that the copyright was infringed by defendant, then you should find for plaintiff SONY BMG MUSIC ENTERTAINMENT. You must then decide on the amount of damages plaintiff SONY BMG MUSIC ENTERTAINMENT is entitled to recover.

Capitol Records, Inc. v. Thomas, Jury Instruction No. 17, Oct. 4, 2007 (Doc. No. 97) (modified); 3B Kevin F. O'Malley, Jay E. Grenig, and Hon. William C. Lee, *Federal Jury Practice & Instructions* § 160.90 (2009).

PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 23

If you find that the plaintiff ARISTA RECORDS LLC had a valid copyright and you find that the copyright was infringed by defendant, then you should find for plaintiff ARISTA RECORDS LLC. You must then decide on the amount of damages plaintiff ARISTA RECORDS LLC is entitled to recover.

Capitol Records, Inc. v. Thomas, Jury Instruction No. 18, Oct. 4, 2007 (Doc. No. 97) (modified); 3B Kevin F. O'Malley, Jay E. Grenig, and Hon. William C. Lee, *Federal Jury Practice & Instructions* § 160.90 (2009).

PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 24

If you find that the plaintiff INTERSCOPE RECORDS had a valid copyright and you find that the copyright was infringed by defendant, then you should find for plaintiff INTERSCOPE RECORDS. You must then decide on the amount of damages plaintiff INTERSCOPE RECORDS is entitled to recover.

Capitol Records, Inc. v. Thomas, Jury Instruction No. 19, Oct. 4, 2007 (Doc. No. 97) (modified); 3B Kevin F. O'Malley, Jay E. Grenig, and Hon. William C. Lee, *Federal Jury Practice & Instructions* § 160.90 (2009).

PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 25

If you find that the plaintiff WARNER BROS. RECORDS INC. had a valid copyright and you find that the copyright was infringed by defendant, then you should find for plaintiff WARNER BROS. RECORDS INC. You must then decide on the amount of damages plaintiff WARNER BROS. RECORDS INC. is entitled to recover.

Capitol Records, Inc. v. Thomas, Jury Instruction No. 20, Oct. 4, 2007 (Doc. No. 97) (modified); 3B Kevin F. O'Malley, Jay E. Grenig, and Hon. William C. Lee, *Federal Jury Practice & Instructions* § 160.90 (2009).

PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 26

If you find that the plaintiff UMG RECORDINGS, INC. had a valid copyright and you find that the copyright was infringed by defendant, then you should find for plaintiff UMG RECORDINGS, INC. You must then decide on the amount of damages plaintiff UMG RECORDINGS, INC. is entitled to recover.

Capitol Records, Inc. v. Thomas, Jury Instruction No. 21, Oct. 4, 2007 (Doc. No. 97) (modified); 3B Kevin F. O'Malley, Jay E. Grenig, and Hon. William C. Lee, *Federal Jury Practice & Instructions* § 160.90 (2009).

PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 27

In this case, each plaintiff has elected to recover "statutory damages" instead of its actual damages and profits.

Under the Copyright Act, each plaintiff is entitled to a sum of not less than $750 or more than $30,000 per act of infringement (that is, per sound recording downloaded or distributed without license), as you consider just. If, however, you find that the defendant's conduct was willful, then each plaintiff is entitled to a sum of up to $150,000 per act of infringement (that is, per sound recording downloaded or distributed without license), as you consider just.

In determining the just amount of statutory damages for an infringing defendant, you may consider the willfulness of the defendant's conduct, the defendant's innocence, the defendant's continuation of infringement after notice or knowledge of the copyright or in reckless disregard of the copyright, the effect of the defendant's prior or concurrent copyright infringement activity, and whether profit or gain was established.

Capitol Records, Inc. v. Thomas, Jury Instruction No. 22, Oct. 4, 2007 (Doc. No. 97); 3B Kevin F. O'Malley, Jay E. Grenig, and Hon. William C. Lee, *Federal Jury Practice & Instructions* § 160.93 (2009) (modified); *Gregerson v. Vilana Fin., Inc.*, 2008 U.S. Dist. LEXIS 11727, at *16 (D. Minn. Feb. 15, 2008) (a plaintiff may recover statutory damages whether or not there is any evidence of actual damages).

PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 28

"Willful" means that a defendant had knowledge that his or her actions constituted copyright infringement or acted with reckless disregard of the copyright holder's rights. Reckless disregard can be inferred from continuous infringement, a past pattern of infringement, continuing infringement despite warnings, or other circumstances.

Capitol Records, Inc. v. Thomas, Jury Instruction No. 23, Oct. 4, 2007 (Doc. No. 97) (modified); 3B Kevin F. O'Malley, Jay E. Grenig, and Hon. William C. Lee, *Federal Jury Practice & Instructions* § 160.54 (2009) (modified); *Gregerson v. Vilana Fin., Inc.*, 2008 U.S. Dist. LEXIS 11727, at *16 (D. Minn. Feb. 15, 2008); *see also Peer Int'l Corp. v. Pausa Records, Inc.*, 909 F.2d 1332, 1336 (9th Cir. 1990) (citing 3 *Nimmer* § 14.04[B], at 14-40.2-.3 (1989)); *Hamil Am., Inc. v. GFI, Inc.*, 193 F.3d 92, 107 (2d Cir. 1999); *GMA Accessories, Inc. v. Olivia Miller, Inc.*, 139 Fed. Appx. 301, 303 (2d Cir. 2005); *Island Software & Computer Serv. v. Microsoft Corp.*, 413 F.3d 257, 264 (2d Cir. 2005) ("even in the absence of evidence establishing the infringer's actual knowledge of infringement, a plaintiff can still prove willfulness by proferring [sic] circumstantial evidence that gives rise to an inference of willful conduct."); *RSO Records, Inc. v. Peri*, 596 F. Supp. 8 (S.D.N.Y. 1984); *Johnson v. Salomon*, 1977 U.S. Dist. LEXIS 15735 (D. Minn. May 25, 1977); *RCA/Ariola International, Inc. v. Thomas & Grayston Co.*, 845 F.2d 773, 779 (8th Cir. 1988) ("reckless disregard of the copyright holder's rights (rather than actual knowledge of infringement) suffices to warrant award of the enhanced damages"); 4-14 *Nimmer* § 14.04[B][3][a]; *MJ Int'l, Inc. v. Hwangpo*, 2002 U.S. Dist. LEXIS 11079, at *7-8 (D. Neb. June 6, 2002) (*citing RCA/Ariola International, Inc.*, 845 F.2d at 779); *Microsoft Corp. v. Evans*, 2007 U.S. Dist. LEXIS 77088, at *15, 18-19 (E.D. Cal. Oct. 16, 2007).

PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 29

You are instructed that documents and information that defendant intentionally failed to preserve, including but not limited to files contained in her computer hard drive, would have been advantageous to plaintiffs and disadvantageous to defendant.

Stevenson v. Union Pacific Railroad Co., 354 F.3d 739, 746-47 (8th Cir. 2004); *E*Trade Securities LLC v. Deutsche Bank AG*, 230 F.R.D. 582, 592-93 (D. Minn. 2005).

PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 30

There are two types of evidence that are generally presented during a trial – direct evidence and circumstantial evidence. Direct evidence is the testimony of a person who asserts or claims to have actual knowledge of a fact, such as an eyewitness. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. The law makes no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all the evidence in the case.

Capitol Records, Inc. v. Thomas, Jury Instruction No. 24, Oct. 4, 2007 (Doc. No. 97); 3 Kevin F. O'Malley, Jay E. Grenig, and Hon. William C. Lee, *Federal Jury Practice & Instructions* § 103.01 (2009) (modified) (citing Fifth Circuit Pattern Jury Instructions (Civil Cases), Instruction No. 3.1 (2006)).

PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 31

The knowledge that a person possesses at any given time may not ordinarily be proved directly, because there is no way of directly scrutinizing the workings of the human mind. In determining the issue of what a person knew at a particular time, you may consider any statements made or acts done by that person and all other facts and circumstances received in evidence, which may aid in your determination of that person's knowledge.

Capitol Records, Inc. v. Thomas, Jury Instruction No. 25, Oct. 4, 2007 (Doc. No. 97).

PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 32

Knowledge may be either actual or inferred from the evidence. Moreover, knowledge can be established by intentional concealment of copyright infringement.

GMA Accessories, Inc. v. Olivia Miller, Inc., 139 Fed. Appx. 301, 303 (2d Cir. 2005); *Island Software & Computer Serv. v. Microsoft Corp.*, 413 F.3d 257, 264 (2d Cir. 2005); *RSO Records, Inc. v. Peri*, 596 F. Supp. 8 (S.D.N.Y. 1984); *Johnson v. Salomon*, 1977 U.S. Dist. LEXIS 15735 (D. Minn. May 25, 1977).

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